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**SUBMITTED ON BEHALF OF:

NATURAL RESOURCES DEFENSE COUNCIL
&
OMB WATCH**

**BEFORE THE
COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON REGULATORY AFFAIRS**

**AT HEARING ENTITLED:

“REGULATORY REFORM: ARE REGULATIONS HINDERING OUR
COMPETITIVENESS?”**

JULY 27, 2005

Good morning. I am Erik D. Olson, a Senior Attorney with the Natural Resources Defense Council (NRDC), a national non-profit public interest organization dedicated to the protection of public health and the environment, with over 500,000 members. I specialize in public health issues including drinking water, pesticides, toxics, and food safety, and also have certain broader responsibilities at NRDC. I am a former attorney for EPA's Office of General Counsel and have taught environmental law classes and seminars. Christopher Murray, a consulting attorney with NRDC, assisted in the preparation of this testimony.

We thank the Chairwoman and members of the Subcommittee for the opportunity to offer our views on whether regulations are hindering our competitiveness and, more specifically, on the legislation before this Subcommittee.

The four bills before you – H.R. 931, H.R. 1167, H.R. 576, and H.R. 3148 – represent several approaches to restricting or guiding Executive Branch agencies' activities in issuing rules to execute federal laws passed by Congress. The bills' goal apparently is to assure that agencies produce beneficial, cost-effective protections. Unfortunately, none of the proposals being discussed today achieves this important goal.

Instead, it is our view that the proposals would cause more public harm than good, because:

- 1) the proposals are duplicative, burdensome, and costly;**
- 2) the proposals are solutions in search of a problem;**
- 3) some of the proposals raise substantial constitutional questions, including separation of powers, separation of bicameral powers, and due process issues that are deeply troubling; and,**
- 4) finally, these proposals provide potentially powerful tools, which if used inappropriately, could serve as a potent weapon to shut down government and eviscerate public health, safety, and environmental protections.**

No Regulation – Competitiveness Link

It also is important to question the assumption upon which these bills apparently rest. As the title of today's hearing suggests, some have alleged that regulations often harm our competitiveness. In fact, many experts have concluded otherwise. As Sidney Shapiro, University Distinguished Professor of Law at Wake Forest University recently summarized in his testimony before this subcommittee, "the scholarly literature provides little or no support for the conclusion that regulation hinders the competitiveness of manufacturing industries or is the cause of significant job losses in those industries. The primary reason that Federal regulation is not responsible for American manufacturers being less competitive is because *regulatory costs average less than one percent of the total value of manufactured goods* in the United States."^{*}

I. H.R. 931, the Congressional Responsibility Act of 2005

The "Congressional Responsibility Act of 2005" (Mr. Hayworth, H.R. 931), would prohibit almost all regulations from taking effect until Congress affirmatively voted to enact them into law. Of the four bills being discussed today, it is the most problematic and poses a significant risk of being successfully challenged on constitutional grounds for violating the principle of separation-of-powers.

H.R. 931 would bog down Congress and regulatory agencies in a mountain of paperwork.

According to John Graham, Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB), Federal agencies establish about 4,500 regulations per year.[†] According to the House Majority Whip's House calendar for 2004, there were approximately 100 days of scheduled votes on the House floor.[‡] A quick calculation suggests that H.R. 931 would require Congress to tackle on average 45 rules during every day of scheduled voting, which would have the deleterious effect of grinding Congress to a halt. To some cynical observers of Congress, this may be viewed as a good thing. Others, however, would point to the fact that Congress has enough trouble passing thirteen appropriations bills each year. This proposal also could shut down much of the Executive Branch, automatically blocking its actions until a time (if and when) Congress acts.

There is no demonstrated need for H.R. 931.

The Congressional Review Act (CRA), codified at 5 U.S.C. Sections 801– 808, already requires all agencies promulgating a covered rule to submit the rule to Congress and the Comptroller General before such rules can take effect, and generally gives Congress 60 days to disapprove of major rules before they take effect. According to a recent report by the Congressional Research

^{*} *Impact of Regulations on U.S. Manufacturing: Hearing Before the House Subcommittee on Regulatory Affairs, Committee on Gov't Reform, 109th Cong. (2005)* (Statement of Sidney A. Shapiro, University Distinguished Chair in Law, Wake Forest University).

[†] *H.R. 2432, Paperwork and Regulatory Improvements Act of 2003: Hearing Before the House Comm. on Gov't Reform, 108th Cong. 16 (2003)* (hereinafter *PRA Hearing*) (Statement of John D. Graham, Administrator, Office of Info. and Regulatory Affairs, Office of Management and Budget).

[‡] House Calendar available at <http://majoritywhip.house.gov/calendar.asp>.

Service, members of Congress have proposed a CRA disapproval resolution 37 times since the CRA took effect in 1996, and one rule has been disapproved.[§] Instead of requiring Congress to vote on all rules, as H.R. 931 requires, Congress merely needs to invoke its existing disapproval authority.

H.R. 931 would draw multiple potentially successful constitutional challenges for violating the principle of separation-of-powers.

The bill appears to run afoul of the principle of separation-of-powers by unduly interfering with the role of the Executive and Judicial Branches. In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), and *Bowsher v. Synar*, 478 U.S. 714 (1986), the Supreme Court struck down Acts of Congress because they impermissibly usurped Executive Branch functions to execute the laws. Here, H.R. 931 would in essence eliminate virtually all new Executive Branch agency rules by rendering them nugatory, instead turning them into nothing more than proposed bills that Congress would have to enact. As a result, the bill would usurp the power of the Executive Branch, preventing it from faithfully executing the laws that authorized the creation of the rules in the first place. This raises substantial balance of powers issues that are profoundly troubling.

Moreover, H.R. 931 may impermissibly usurp judicial powers. Section 7 of the bill states that regulations enacted pursuant to H.R. 931 would not be considered “agency action for the purpose of judicial review” under chapter 7 of title 5 of the Administrative Procedure Act. 5 U.S.C. Section 704 of the APA requires, in part, final agency action before any judicial review is allowed. H.R. 931 could therefore be read to purport to completely eliminate the ability of individuals to seek judicial relief for any wrongs suffered due to agency action. This raises significant Constitutional questions as to whether Congress can so circumscribe judicial powers under Article III of the Constitution, and can eliminate the fundamental right of individuals to due process and to seek judicial redress for wrongs committed by their government. *See, e.g. Bartlett v Bowen*, 816 F.2d 695, 705-707 (D.C. Cir. 1987).

H.R. 931 simply fails to respect the interdependence among the branches in our unique system of governance. In the often-quoted words of Justice Jackson: “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”** Moreover, it also could effectively shut down the Legislative and Executive branches’ activities. Therefore, we are opposed to H.R. 931.

II. H.R. 1167, Amending the “Truth in Regulating Act of 2000”

Another piece of legislation, H.R. 1167 proposes amendments to the “Truth in Regulating Act of 2000 (TIRA),” (Pub. L. No. 106-312, 114 Stat. 1248). It would make permanent what was supposed to be a pilot project that permits Congress to request an independent evaluation from the Government Accountability Project (GAO) of an agency’s cost-benefit analysis after it

[§] Morton Rosenberg, CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment After Nullification of OSHA’s Ergonomics Standard*, July 20, 2005, p. 6.

** *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion).

publishes an “economically significant rule”.^{††} Despite enacting the Truth in Regulating Act, Congress has never appropriated the money necessary,^{‡‡} as required under the Act, to permit GAO to conduct the pilot project.^{§§} Therefore, in essence, this bill seeks to put the “pilot program” on during prime time, without having first tried it out.

H.R. 1167 would create a costly, burdensome program.

For a Congress that prides itself on streamlining government, H.R. 1167 would create a costly, burdensome program. Cost-benefit analyses, according to a study by the Congressional Budget Office (CBO), costs agencies significant time, money, and staff effort.^{***} The study further states that each cost-benefit analysis varied in the amount of time it took to complete, with an average of three years and a range of six weeks to more than 12 years.^{†††} The CBO found that the average cost for a cost-benefit analysis was about \$570,000, with a range of \$14,000 to more than \$6 million per analysis.^{‡‡‡} Adjusted for inflation using 2005 dollars, the average costs are about \$727,000, with a range of \$17,800 to more than \$7.7 million per analysis.^{§§§}

On top of the agency’s costly and time-consuming cost-benefit analyses, and the detailed review of those analyses already conducted by the Office of Management and Budget and frequently by agencies’ outside peer review committees, H.R. 1167 would require yet another duplicative expenditure of time, money, and staff effort by GAO to conduct a re-re-evaluation of the agency’s cost benefit analysis. Based on information from the GAO, CBO estimated that those activities would cost taxpayers about \$8 million annually.^{****}

GAO does not have the resources to comply with the Truth in Regulating Act.

The GAO has stated that it lacks the capacity to comply with the Truth in Regulating Act and more troubling, cannot accept all of its current congressional requests. In a May 2004 letter to the Committee, Comptroller General Walker stated that “any expansion of GAO’s scope without additional dedicated resources would pose a serious problem for us, especially in light of what will likely be increasing budgetary constraints. It would also likely serve to adversely affect our ability to provide the same level of service to the Congress in connection with our existing

^{††} P.L. No. 106-312, which H.R. 1167 is amending, defines an “economically significant rule” as “any proposed or final rule, including an interim or direct final rule, that may have an annual effect on the economy of \$100,000,000 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

^{‡‡} Letter from David M. Walker, Comptroller General of the United States, to The Honorable Henry Waxman, Ranking Minority Member of the Committee on Government Reform, U.S. House of Representatives (May 11, 2004) (on file with the Committee on Government Reform).

^{§§} Section 6(b) of the Truth in Regulating Act states that the pilot project would continue only if in each fiscal year, “a specific annual appropriation not less than \$5,200,000 or the pro-rated equivalent thereof shall have been made for the pilot project.”

^{***} Congressional Budget Office, *Regulatory Impact Analysis: Costs at Selected Agencies and Implications for the Legislative Process*, March 1997, preface. Available at <http://www.cbo.gov/ftpdocs/40xx/doc4015/1997doc04-Entire.pdf>.

^{†††} *Id.* at viii.

^{‡‡‡} *Ibid.*

^{§§§} Inflation adjustment using the Consumer Price Index inflation calculator from the Bureau of Labor Statistics, available at <http://www.bls.gov>.

^{****} Congressional Budget Office, *Cost Estimate: H.R. 2432, Paperwork and Regulatory Improvements Act of 2004* (May 14, 2004), p. 2, available at <http://www.cbo.gov/ftpdocs/54xx/doc5451/hr2432.pdf>.

statutory authorities.”^{††††} Yet, H.R. 1167 strikes Section 5 of the TIRA, which specifically authorizes \$5,200,000 to carry out the Act, without replacing it with any additional monies.

GAO has stated that TIRA should not be a permanent program.

Moreover, Comptroller General Walker stated in the same letter that, “in our view, if Congress wants TIRA to continue, we believe it should do so as a pilot project rather than as a permanent authority.”^{††††}

H.R. 1167 is duplicative of existing government functions performed by OMB and is based on a faulty assumption that existing information is not already transparent.

H.R. 1167 is further troubling because, if enacted, it would be duplicative of functions already performed by the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA). Under Executive Order 12866, OIRA must review a “significant regulatory action”.^{§§§§} In 2003, this amounted to review of about 500 agency rules by OIRA.^{*****} The content of these reviews are readily available to Congress. H.R. 1167 would similarly require, on a permanent basis, a review of these rules by GAO. In explaining the necessity for this duplication, Section 2 of TIRA states that the purpose of the Act is, in part, “to increase the transparency of important regulatory decisions.” This assumes that information already coming to Congress from OIRA and the agencies is not already transparent. This simply is not the case.

The likely purpose of H.R. 1167 is to advance the flawed concept of “regulatory caps”.

In light of GAO’s resistance to making TIRA permanent and the weak rationale for doing so, we must ask: why have proponents been advocating this proposal in various forms since at least 1997? Clues to its potential underlying purpose of at least some of its supporters are found in prior testimony submitted by Fred Smith, President and Founder of the Competitive Enterprise Institute, an industry-funded organization. In response to a written question from Chairman Davis on whether the GAO should have permanent staff to provide Congress with an independent evaluation of an agency’s cost-benefit analysis, Mr. Smith generally agreed and began his response by stating that he supports it as movement towards “regulatory budgets.”^{†††††}

A regulatory budget is actually a “regulatory cap,” a deeply flawed concept that limits the total costs that an agency’s combined rules can impose on industry or others. The cap on rules’ costs would be based solely on the costs — there would be no consideration of their benefits. Once an agency reached its cap, it would not be allowed to issue further rules, even if the benefits were far greater than the costs. It makes one wonder: if the true goal of “regulatory reform” advocates is to maximize the net benefits of rules, why are the advocates not urging that agencies’ rules achieve a minimum level of aggregate net benefits?

^{††††} See footnote 7, *supra*.

^{††††} *Ibid*.

^{§§§§} Executive Order 12866 defines “significant regulatory action”, in pertinent part, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities” *Compare* the similarity of a “significant regulatory action” under E.O. 12866 *with* an “economically significant rule” under Section 3 of the Truth in Regulating Act of 2000 at footnote 6, *supra*.

^{*****} See footnote 2, *supra*.

^{†††††} *PRA Hearing*, p.68 (Statement of Fred Smith, President and Founder, Competitive Enterprise Institute).

Additionally, it is important to recognize that cost estimates are inherently inaccurate and generally biased upward. The estimates are based on prospective projections of regulatory costs, with no validation after the regulations have been implemented. ****

Moreover, those agencies that protect the environment and promote safety in the workplace and the highways are often the agencies singled out for regulatory budget pilot projects. As has been repeatedly demonstrated, corporations will act in their own short-term best interests to maximize profit. Government protections have always been and will remain necessary to protect our environment and the public health and safety from corporate negligence.

The advocates of this legislation may hope that the ability of the Administration to implement regulatory caps would be advanced by having GAO calculate the costs of rules, and thereby lay the groundwork for an agency's budget cap. OMB and the advocates of regulatory caps may use GAO's independent analysis to lend a false appearance of technical objectivity to a political decision that is designed to benefit corporate interests over the public's interest.

Therefore, we are also opposed to H.R. 1167.

III. Congressional Review Act Amendments (H.R. 576 & H.R. 3148)

H.R. 576 and H.R. 3148 both would amend the Congressional Review Act (CRA) to establish a new partisan congressional committee composed of 12 Members from both the House and Senate to be appointed by the majority leader of the Senate and the Speaker of the House of Representatives. Before an agency rule could take effect, an agency must submit to the joint committee a copy of the rule and a concise statement on whether it is a major rule. In addition, while the precise contours of the committee's powers envisioned by the bills are not entirely clear, apparently the joint committee would be empowered to adopt a resolution of disapproval, which could trigger floor or committee action in the requisite body.

Raises Bicameral Legislature Constitutional Questions

We are concerned that vesting such extraordinary authority in a joint committee—whereby it is possible that a relative handful of members of one Congressional body (e.g. the Senate) could effectively force action in the other body (e.g. the House), raises substantial Constitutional questions. Article I mandates that there be separate bicameral legislative chambers, the House and the Senate, which retain separate powers. As the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*, *supra*, highlights, statutes must be very careful not to tread on the bicameral legislative plan established by the framers.

**** *How to Improve Regulatory Accounting: Costs, Benefits, and Impacts of Federal Regulations – Part II*, 108th Cong. 89 (2004) (Statement of Joan Claybrook, President Public Citizen). *See also PRA Hearing*, pp. 106-113 (Statement of Lisa Heinzerling, Professor of Law at the Georgetown University Law Center, Vice President of Center for Progressive Reform), and Thomas O. McGarity & Ruth Ruttenbert, *Counting the Cost of Health, Safety and Environmental Regulation*, 80 Tex. L. Rev. 1997 (2002).

H.R. 576 and H.R. 3148 create an Über-Committee whose oversight jurisdiction would surpass all other standing congressional committees combined.

In carrying out the duties under the CRA, each bill grants the committees broad authority to hold hearings, administer oaths, and report to Congress on matters within their jurisdiction. The exact scope of this jurisdiction is not expressly outlined, but is clearly extraordinarily expansive, because given that Section 804(3) of the CRA adopts the definition of “rule” found in 5 U.S.C. 551(4) of the APA, the joint committee would have the express authority to conduct oversight on *every substantive agency regulation*.^{§§§§§} This creates an Über-Committee whose oversight jurisdiction would surpass all other standing committees in the House and Senate combined. Congress should pause and think long and hard before enacting anything like H.R. 576 and H.R. 3148. Congress should recognize the staggering breadth of the new joint committee’s jurisdiction, its duplication of and intrusion into the oversight authorities of this committee and virtually every other standing committee in Congress, and its potential to undermine and override the jurisdiction of the current standing committees.

There is no demonstrated need for overhauling the CRA.

Despite these serious failings, there is no demonstrated need to overhaul the CRA. Congress generally has chosen to exercise its authority under the CRA only sparingly—indeed, according to CRS, individual members of Congress have proposed disapproval of agency rules only 37 times, when about 39,400 rules have been adopted since the CRA was enacted.^{*****} It is unclear why the existing authorizing committees need to be supplanted or duplicated by another committee.

The CRA has been used to consistently attack public health, safety, and environmental protections.

Moreover, despite some good applications of the CRA, it has often been used to attack public health, safety, and environmental protections – 11 of the 37 resolutions – based on the recent study by the CRS.^{†††††} Of those 37 resolutions, one nullified OSHA’s ergonomics safety standards, which were strongly opposed by business interests.

There are also several specific examples of how the CRA was used to attack environmental protections. For example, in January 2001, the Department of Energy (DOE) issued appliance efficiency standards for air conditioners, clothes washers, and water heaters. Rep. Joe Knollenberg sponsored two joint resolutions of disapproval to block the standards. Not only were these standards the product of years of debate, they are critical to solving the energy shortages the nation now faces. The new appliance efficiency standards promise tremendous environmental benefits, as well as consumer savings. Consumers and business are projected to

^{§§§§§} Section 804(3) adopts the definition of “rule” found at 5 U.S.C. 551(4), which provides that the term rule “means the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy.” 804(3) expressly excludes any rule of particular applicability; or any rule of relating to agency management or personnel; or any rule of agency organization or practice that does not substantially affect the rights or obligations of non-agency parties. The legislative history of Section 551(4), however, indicates that the term rule is to be construed broadly to encompass “virtually every statement an agency may make.” *See Avoyelles Sportsmen’s League, Inc., v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

^{*****} See footnote 4, *supra*, at pp. 7 – 12.

^{†††††} See footnote 4, *supra*, at pp. 7 – 12.

save over \$22 billion during 2004-2030 due to the new standards.^{*****} The resolutions of disapproval were not adopted.

This Committee should consider providing recommendations to Congress on abolishing obsolete corporate subsidies to increase our country's competitiveness.

It is important to note that contrary to the title of this hearing, there is no substantial evidence that rules harm U.S. competitiveness. The above rules are examples of types of programs that will increase our competitiveness, spurring U.S. corporations to develop new technologies to retain our competitive advantage in the global marketplace. However, our government often awards disproportionate public favors in the form of corporate subsidies to certain industries that have little or nothing to do with competitiveness — and even undermine it. For example, the oil and gas industry is often the beneficiary of huge subsidies, which inevitably do injury to clean energy competitors who do not receive the same handouts.

For this reason, if this committee is truly interested in fairness and competitiveness, perhaps it should explore proposals for creating a temporary commission (with no power to force action by either chamber or to supersede authorities granted to standing committees), to provide recommendations on abolishing obsolete, anticompetitive subsidies that force taxpayers to support subsidies that no longer serve the public interest. A bill to this effect is already before your committee, H.R. 974. We encourage the committee to take the courageous step of giving this or a similar bill a fair hearing in the coming months, especially in light of the fact that House and Senate conferees are currently negotiating tax breaks for the oil and gas industry in the energy bill.

Let me close by saying that we appreciate the opportunity to share my thoughts with you. We stand ready at any time to help the members of the committee think through how to ensure our country remains competitive without resorting to legislative gimmicks, which if used in a cynical manner, could attack and seriously weaken our country's landmark environmental, health, and safety protections.

Thank you.

^{*****} *A Rush to Regulate – The Congressional Review Act and Recent Federal Regulations Before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the Committee on Government Reform*, 107th Cong. (2001) (Statement of Sharon Buccino, senior attorney, Natural Resources Defense Council).